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No. 77-1442

In the Supreme Court of the United States

OCTOBER TERM, 1977

AKERS MOTOR LINES, INC., OF DELAWARE, ET AL.

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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1. Petitioner Akers Motor Lines filed an application with the Interstate Commerce Commission in October 1974, seeking authority under Section 5 of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 5, to acquire control of petitioners Central Motor Lines and Northern Freight Lines. The application was consolidated with a separate application, filed by Transcon Lines, seeking authority to purchase a portion of Central's and Northern's operating rights (Pet. App. 1a-3a).

After a hearing, an administrative law judge, on May 12, 1976, approved both applications (Pet. App. 1a-9a). An appendix to the initial decision (Pet. App. 10a-41a) enumerated all the operating rights approved for purchase by Transcon Lines and all the operating rights to be

retained by Central and Northern. Because no exceptions were filed within 30 days, the initial decision became the decision of the Commission. 49 C.F.R. 1100.96(b); 49 C.F.R. 1100.97(a) (1976 ed.).

On August 15, 1976—95 days after the initial decision was issued—Central Motor Lines filed with the Commission a letter complaining that the initial decision incorrectly listed the operating rights to be retained by Central and Northern. The Commission treated the letter as a petition for modification of the initial decision, and in November 1976 it denied the petition (Pet. App. 44a-47a). The order observed that petitioners had not explained why they had not filed no exceptions from the initial decision or why their letter-petition was not filed until more than 60 days after the effective date of the Commission's adoption of the initial decision (Pet. App. 46a). The order also stated that certain "undesirable" consequences would result if the requested modification were granted (*ibid.*).[1] In April and June 1977 the Commission denied two further petitions for administrative review (Pet. App. 48a-52a).

On June 23, 1977, petitioners filed in the court of appeals a petition seeking judicial review of the May 1976 initial decision and the Commission's orders of April and June 1977. The court of appeals dismissed the petition as untimely (Pet. App. 54a-60a). It reasoned that the 60-day time period for filing petitions for judicial review of

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[1]Granting the petition for modification, the Commission found, would allow petitioners to "offer a service duplicative of that which Transcon Lines proposes to offer as a result of the transaction" and "would result in an unconventional division of operating authority where two carriers would provide a limited service within the same territory, tending to create confusion among shippers and wasteful and inefficient use of transportation facilities" (Pet. App. 46a).

Commission orders specified by 28 U.S.C. 2344 began to run on June 11, 1976, the date on which the initial decision became the decision of the Commission.

The running of that period was not affected, the court held, by Central's August 1976 letter, because "the letter petition * * * was untimely filed and the Commission did not find good cause for granting the petition" (Pet. App. 58a-59a). The court also held that the Commission's denial of the petition for modification and the two further petitions for administrative review "do not create new final orders which would give this court jurisdiction to review the [initial] decision which the Commission adopted" (Pet. App. 59a). Finally, the court stated that, "[b]ecause the Commission considered the 'unexplained delay' in filing the letter petition and the 'undesirable results' that would have been created by reopening the case, we find no abuse of discretion in denying the untimely filed letter petition or the two subsequent petitions" (Pet. App. 59a-60a).

2. Although we took the position in the court of appeals that the petition for review should not be dismissed, we do not believe that the issue warrants review by this Court.

Petitioners argue that the court of appeals' decision "effectively bars from review substantive agency action entered after a proceeding has become administratively final" (Pet. 5). We read the decision more narrowly. In our view, the decision is consistent with the established principle that, when an agency accepts an untimely administrative appeal or petition for rehearing and disposes of the request on the merits, both the underlying order and the order on appeal are reviewable on the merits. See *Tallman* v. *Udall*, 324 F. 2d 411, 416-417

(C.A. D.C.), reversed on other grounds, 380 U.S. 1.[2] The same rule governs untimely petitions for rehearing in the federal courts. *Pfister* v. *Northern Illinois Finance, Corp.*, 317 U.S. 144, 149-150; *Bowman* v. *Loperena*, 311 U.S. 262, 266.

But it also is settled that an untimely petition, denied because of its untimeliness, does not start anew the time within which to seek judicial review. Cf. *Califano* v. *Sanders*, 430 U.S. 99. The court of appeals apparently concluded that the Commission's disposition of the August 1976 letter-petition was more akin to a rejection on the ground of untimeliness than to an acceptance followed by a denial on the merits. Although we disagree with that assessment, we recognize that the Commission's action has elements of both a rejection and a denial on the merits. Because the case presents, in our view, only a factual issue concerning the characterization of the Commission's action in response to Central's August 1976 letter-petition, we see no reason for this Court to review the court of appeals' judgment.

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[2]In *Tallman* the plaintiffs did not seek judicial review of a final order of the Secretary of the Interior within the statutory 90 day period. More than five months after the order, however, the plaintiffs filed a petition with the Secretary seeking the exercise of his supervisory authority to revise his initial decision. The Secretary denied this petition on the merits. The court of appeals held that the plaintiffs could obtain judicial review of the original order because their petition seeking reconsideration had been considered on the merits and the Secretary had reaffirmed his decision. See also *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F. 2d 147, 151 (C.A. D.C.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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